

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

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UNITED STATES OF AMERICA, : Case No. 1:21-cr-491  
: Cleveland, Ohio  
Plaintiff, :  
:  
v. : Monday, July 8, 2024  
: 12:04 p.m.  
PAUL SPIVAK, et al., :  
:  
Defendants. :  
-----X

TRANSCRIPT OF STATUS CONFERENCE PROCEEDINGS

BEFORE THE HONORABLE J. PHILIP CALABRESE

UNITED STATES DISTRICT JUDGE

Court Reporter: Donnalee Cotone, RMR, CRR, CRC  
Realtime Systems Administrator  
United States District Court  
801 West Superior Avenue  
Court Reporters 7-189  
Cleveland, Ohio 44113  
216-357-7078  
donnalee\_cotone@ohnd.uscourts.gov

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1 APPEARANCES:

2

3 For the ALEJANDRO A. ABREU  
4 Government: Assistant United States Attorney  
801 West Superior Avenue  
Suite 400  
5 Cleveland, Ohio 44113  
216-622-3620  
6 alejandro.a.abreu@usdoj.gov

7 For Defendant DAVID L. AXELROD, ESQ.  
8 Paul Spivak: LAUREN W. ENGELMYER, ESQ.  
Ballard Spahr LLP  
1735 Market Street, 51st Floor  
9 Philadelphia, Pennsylvania 19103  
215-665-8500  
10 daxelrod@ballardspahr.com  
lengelmyer@ballardspahr.com  
11

12 For Defendant JOHN F. MCCAFFREY, ESQ.  
13 Olga Smirnova: IZAAK HORSTEMEIER-ZRNICH, ESQ.  
Tucker Ellis LLP  
950 Main Avenue  
14 Suite 1100  
Cleveland, Ohio 44113  
15 216-592-5000  
jmccaffrey@tuckerellis.com  
16 izaak.horstemeier-zrnich@tuckerellis.com

17 For Defendant MICHAEL J. ROSEN, ESQ.  
18 Christopher Michael J. Rosen, P.A.  
Bongiorno: 100 S.E. 2nd Street, Suite 3400  
19 Miami, Florida 33131  
305-446-6116  
20 mjr@mjrosenlaw.com

21

22

23

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1 AFTERNOON SESSION, MONDAY, JULY 8, 2024

2 (Proceedings commenced at 12:04 p.m.)

3 - - -

4 THE COURT: Good afternoon, everyone.

12:04:15 5 We are on the record in Case Number 1:21-cr-491,  
6 *United States of America v. Paul Spivak, and others.*

7 Counsel, will you please state your appearances for  
8 the record.

9 MR. ABREU: Good afternoon, Your Honor.

12:04:31 10 Assistant U.S. Attorney Alex Abreu for the  
11 United States.

12 MR. AXELROD: And good afternoon, Your Honor.  
13 David Axelrod and Lauren Engelmyer on behalf of  
14 Paul Spivak.

12:04:41 15 MR. McCAFFREY: Your Honor, good afternoon.  
16 John McCaffrey and Izaak Zrnich on behalf of  
17 Olga Smirnova.

18 MR. DeVILLERS: Good afternoon, Your Honor.  
19 Dave DeVillers and Billy Martin on behalf of  
12:04:53 20 Mr. Scott.

21 MR. ROSEN: Good afternoon, Judge.

22 Michael Rosen on behalf of Chris Bongiorno.

23 THE COURT: Well, good afternoon, everyone.

24 There's a number of items on my agenda. There may be  
12:05:05 25 a few other things you all want to raise.

1           So let me kind of go through what I have on my list,  
2           and then we'll address anything else that we need to at this  
3           point.

4           So first, at the outset, let me say, there's several  
12:05:21 5           filings that various parties have made. The one that I have  
6           not read and have not prepared to deal with today as a  
7           result is the motion from the United States for  
8           reconsideration on the dismissal of Counts 48 and 50. I've  
9           simply not had a chance to read that at this point. In  
12:05:42 10          large part, that's because I spent the last week in  
11          temporary restraining order proceedings, getting that ruling  
12          out last night. So my calendar's opened up a little bit  
13          today. So I will turn to that promptly and get to it, but I  
14          just have not had the opportunity to do that yet.

12:06:06 15          There were submissions regarding *Jencks*, *Brady*, and  
16          *Giglio*, which I have read. But I'm happy to hear from each  
17          of you on those issues. And perhaps it makes sense to take  
18          them one at a time. I have them in that order, but it might  
19          make sense to take them in a different order.

12:06:31 20          So, Mr. Abreu, happy to hear from you first on those  
21          issues, since, you know, the order of briefing has basically  
22          been United States followed by the defendants. And I'm  
23          happy to have you respond to anything that they raised, or  
24          put any other issues or the like on the table from the  
12:06:50 25          perspective of the Government.

1 MR. ABREU: Thank you, Your Honor.

2 Yes, Your Honor. In terms of our -- the second notice  
3 of discovery status, which was filed to notify the Court  
4 relative to some of the deadlines in that second pretrial  
12:07:08 5 and trial order, that had called for certain disclosures  
6 being made by the end of the month. And I think we asked  
7 for a little bit more time, and the Court graciously granted  
8 that. And so it was just to inform the Court that we, in  
9 our view, had complied with what the Court had ordered, and  
12:07:28 10 had provided, I think importantly, the reverse proffer to  
11 the defendants in terms of a presentation of what we thought  
12 was some of the most germane evidence, our theory of the  
13 case, and had done that by the -- in the timeline that the  
14 Court had ordered.

12:07:54 15 Of course, sort of programatically, the  
16 U.S. Attorney's Office, it's, I think, careful and wanted to  
17 express that, you know, we -- because in this case, we have  
18 always said that we were happy to do those kinds of meetings  
19 and have those kinds of meetings. And I think even before  
12:08:19 20 we did this last reverse proffer for all of the defendants,  
21 we had met with several defendants and had those meetings.

22 We just wanted to make sure that there was a notice of  
23 their -- for the Court's view, on what -- to specify what we  
24 did and what we didn't do, and why we didn't interpret the  
12:08:40 25 Court's order in a certain way for other legal reasons.

1           The -- Your Honor, the issues raised by Mr. Spivak and  
2           Ms. Smirnova in their response, I'll have to say are the  
3           first time that I've heard these specific requests in terms  
4           of favorable letters sent by victims, notes from FBI  
12:09:08 5           interviews that are favorable to the defendants from  
6           employees of the company, and a request for all of the, you  
7           know, plea agreements and other documents relative to  
8           cooperators that may or may not testify in the case.

9           I think we're happy to work that -- those issues out  
12:09:29 10          with the defense. I don't think there is as much daylight  
11          between our positions as they might -- as they might worry  
12          that there are. I think -- and I think everybody can  
13          appreciate that the United States has, from our view, some  
14          legal obligations, and there are sort of legal timelines in  
12:09:59 15          terms of when those disclosures have to be made.

16          And so I try not to promise in excess of those  
17          timelines, but with the full knowledge and -- that, you  
18          know, we will make disclosures earlier than, you know, after  
19          a witness testifies or the day before. But that is the  
12:10:16 20          minimum. And the United States, in general, resists efforts  
21          to have that timeline dictated by the defendants to do it.

22          And so that's the only issue I would take with the  
23          defendants' response, is its request that the Court order by  
24          certain dates that it turn over *Jencks*, or that it views the  
12:10:49 25          materials that it calls out as *Brady* or *Giglio* -- really, as

1 *Brady* or *Giglio*. They're *Jencks* materials. These are -- if  
2 any of these things exist, they are memorializations of  
3 statements made by third parties.

4 And to the extent that they're, you know, favorable to  
12:11:08 5 the defendants -- again, first time I've heard about it.  
6 I'm not aware of any particular letter that, you know, I'm  
7 withholding that says any particular defendant is, you know,  
8 completely innocent, and they didn't do this. But I'm happy  
9 to look through that stuff. That's not really an issue.

12:11:24 10 So I guess that's really, in terms of the discovery  
11 status, where we stand.

12 THE COURT: All right. Thank you.

13 Mr. Axelrod, happy to hear from you first on the  
14 issues, unless you want to hand that football off to  
12:11:44 15 somebody else.

16 MR. AXELROD: No. I'll start. And I'm  
17 certain that Mr. McCaffrey will fill in for everything that  
18 I've missed or didn't do a good enough job explaining. But  
19 with all due respect to Mr. -- Assistant United States  
12:12:00 20 Attorney Abreu, I think there is some daylight here.

21 I mean, when we saw this second notice of discovery  
22 where it says in no uncertain terms, the Government believes  
23 any *Brady* material would have been produced by the Court's  
24 deadline of June 30th, 2023, I mean, I was pretty shocked,  
12:12:17 25 actually. Because we are aware of both investor victim

1 witnesses and USLG employee witnesses who have spoken to the  
2 FBI, and, you know, listen, under Mr. Abreu's  
3 characterization, I'm not sure that anyone has told the FBI  
4 that all of the defendants are completely innocent and this  
12:12:35 5 case should go away. But we do know that they have made  
6 favorable statements about USLG, about Mr. Spivak and  
7 Ms. Smirnova, and perhaps, other favorable things.

8 And so we don't take a narrow --

9 THE COURT: I guess one of the questions --  
12:12:49 10 and I apologize for interjecting on that particular example.  
11 I know it's not the only one you gave.

12 But are those statements that go to trial evidence?

13 It seemed to me that they go more to mitigation at  
14 sentencing, if we get to sentencing. But, I mean, I don't  
12:13:07 15 know what they might be.

16 MR. AXELROD: Well, Your Honor, I think the,  
17 you know, Government's taken a position that selling  
18 securities in USLG is a fraud, right?

19 So, perhaps, a defense to that could be that selling  
12:13:21 20 securities in USLG is not a fraud because people who were  
21 investing got the shares that they were promised and got  
22 shares in a company that is both real, significant, and a  
23 real ongoing business.

24 And I think that witnesses who have knowledge -- who  
12:13:38 25 would testify about that ongoing business and about the good



1 faith of both Ms. Smirnova, Mr. Spivak, and others at USLG,  
2 of course, go to intent for the crimes that are charged.

3 THE COURT: All right. Sorry. I interrupted  
4 you.

12:13:54 5 MR. AXELROD: No, that's okay.

6 But so that's the first thing.

7 The second thing is that evidence of bias, of a  
8 witness's bias is *Brady*. I mean, this is settled law. And  
9 here we have, I suspect, though I haven't seen the  
12:14:15 10 Government's witness list, I suspect it's going to contain  
11 other defendants who have been charged in this case who have  
12 received promises from the Government, who may have criminal  
13 records, who may have been sued by -- for other things that  
14 call into question their credibility.

12:14:30 15 I think there are going to be witnesses who are not  
16 sued by the Government but were given leniency or other  
17 promises of nonprosecution for their testimony. And all of  
18 that goes to -- goes to *Brady*. And we haven't seen any of  
19 that.

12:14:45 20 And I don't know -- I guess I'm not sure of why we  
21 would have ever had to request *Brady* and *Giglio* and  
22 information about a Government witness's bias or those  
23 things. But to the extent we haven't asked for them, I'm  
24 certainly making it clear, we're asking for it now. And I'm  
12:15:08 25 shocked that we haven't got it.

1 But those are quite different -- then I'll move to the  
2 second part of our response -- than the *Jencks* issue.

3 Now, the *Jencks* Act says what *Jencks* Act says, and  
4 we're all aware of what that is. But Your Honor has his  
12:15:26 5 rules, which suggests that the Government provide *Jencks* as  
6 early as possible. And then we have a court order from the  
7 Court that says by July 22nd, the *Jencks* Act material should  
8 be provided.

9 And, you know, I know that the Government takes a very  
12:15:38 10 black and white view of what the law is, saying that the  
11 *Jencks* Act says you can get it after the witness testifies  
12 at trial, which, of course, would lead to a trial that  
13 could -- I don't know how a trial like that would happen.  
14 We'd have to take huge breaks, and the jury would be put  
12:15:55 15 out, and it wouldn't be an efficient use of the Court's or  
16 the jury's or the lawyers', or the parties' time.

17 But here we have a Court order, and there are courts  
18 across this country who have said that there are other  
19 constitutional issues in play besides the *Jencks* Act, which  
12:16:09 20 is a statute put forth by Congress. And these things all  
21 work together.

22 And I don't think we're asking for something crazy  
23 saying, "Can we have statements of what witnesses in a  
24 sophisticated, complicated white-collar case may say three  
12:16:26 25 weeks before trial so that we have the ability to

1 effectively represent our clients and can track down  
2 relevant material, things that those witnesses may say,  
3 things that they've said that are favorable to our clients  
4 so we can prepare those?"

12:16:40 5 I've just -- I've never been put in a position like  
6 this where I'm having to fight for *Jencks* materials in a  
7 case that doesn't involve credible threats to witnesses'  
8 safety. It just -- I find it a little surprising.

9 So that kind of takes us through the discovery issues  
12:16:54 10 that were briefed.

11 I have another -- I should say that Mr. McCaffrey and  
12 I have another couple discovery issues that have not been  
13 briefed. But I didn't want to move on to those until  
14 everyone has had a chance to speak to these issues.

12:17:10 15 THE COURT: All right. Mr. McCaffrey.

16 MR. McCAFFREY: Just to supplement what  
17 Mr. Axelrod said, about two weeks ago, Your Honor, we did  
18 get about 4,000 pages of documents from the Government. And  
19 I guess we were anticipating that at least in there, there  
12:17:25 20 would be some of the *Brady* and *Giglio* material. But as has  
21 been referenced, for example, you know, we've only been able  
22 to obtain one codefendant's plea agreement.

23 As it's this Court's practice, as well as other  
24 members of the Court, the plea agreements are not filed  
12:17:44 25 until the time of sentencing. But that certainly doesn't

1 preclude the Government from producing those. We have a  
2 protective order in this case. We had anticipated that  
3 those plea agreements would be within those 4,000 pages, and  
4 some of the other material that Mr. Axelrod has addressed,  
12:18:04 5 but it was not.

6 On the -- on the issue of the *Jencks*, my concern,  
7 Your Honor, is -- because I've had this happen with the  
8 office before -- is that right on the eve of trial, we're  
9 going to get a dump of 302s, not just for those witnesses  
12:18:25 10 that are going to testify, but also for all the other  
11 individuals that may have been interviewed in connection  
12 with the case as somehow satisfying the *Brady/Giglio*  
13 obligation on the eve of a trial.

14 And just to echo what Mr. Axelrod said, you know, some  
12:18:46 15 of these -- some of these witness 302s, because it may have  
16 involved several different interviews over the long time  
17 span of this case, could be, you know, 30, 50, 70 pages  
18 long. And because they're just a continuous chronological  
19 summary of the different interviews, and we may -- we may  
12:19:14 20 well be coming to the Court and asking for time to be able  
21 to go through that material, especially if we're getting it,  
22 you know, into the wee hours of the night before.

23 I do -- and as Mr. Axelrod said, there are some other  
24 issues in the second notice of discovery status if you want  
12:19:36 25 to address those.

1 THE COURT: All right. Thank you.

2 Mr. DeVillers, is there anything to add?

3 MR. DeVILLERS: Yes, Your Honor.

4 Mine is probably more fact-specific. But in the -- my  
12:19:49 5 fear is that some of the 16(a)(1)(B), that is, my client's  
6 statements, are somehow being considered *Jencks*. And I say  
7 that because of the last tranche of discovery we provided.

8 In that discovery was an email chain with Mr. Church,  
9 who is, I'm assuming, a cooperating codefendant. He was  
12:20:11 10 originally indicted with Mr. Scott. Where there are  
11 statements from my client that we just got, we've never had  
12 that before, and in that particular tranche, within the  
13 inventory of discovery, it says there's other emails from  
14 Mr. Church, which aren't in discovery. Mr. Abreu is working  
12:20:30 15 with us on those getting us those.

16 But my fear is that we're going to get -- I'm going to  
17 get my own client's statements through emails of either  
18 Mr. Church or Mr. Mallion, or any other codefendant, or  
19 anybody, that we haven't been provided yet. And this is  
12:20:47 20 discoverable information that we should have gotten a long  
21 time ago. I know Mr. Church is relatively new to the game,  
22 but not that new. And if in the next, you know, three or  
23 four weeks were spent reviewing thousands of emails, that  
24 concerns me.

12:20:59 25 THE COURT: All right. Thank you.

1 Mr. Rosen.

2 MR. ROSEN: Judge, the only point I wanted to  
3 add is that on the *Giglio* issue, rather than just simply  
4 accept the information that the Government gives, certainly  
12:21:12 5 on the eve of trial, we ought to have the opportunity to  
6 investigate the information that's contained in the *Giglio*  
7 and not just rely upon what information the Government is  
8 providing. So that the timing of providing that information  
9 becomes very critical.

12:21:28 10 So I'm asking the Court to entertain an order that  
11 directs the Government to forthwith provide this *Giglio*  
12 information on all of its witnesses so the defense has the  
13 opportunity to investigate the information, and the  
14 information behind what the Government is giving us.

12:21:46 15 THE COURT: All right. Thank you.

16 Mr. Abreu, I'm happy to have you address any of those  
17 concerns if you feel the need to do so or care to do so.

18 MR. ABREU: Yes, Your Honor. Thank you.

19 I guess with respect to, I think, probably the  
12:22:01 20 clearest issue, which is what Mr. DeVillers has raised  
21 relative to the emails with Mr. Scott, I believe we  
22 disclosed four or five emails that weren't received through  
23 the normal discovery process, or as part of the  
24 investigation. And admittedly, they weren't provided sort  
12:22:25 25 of immediately when the Government received them. But their

1 existence and the contents, at least generally, were  
2 discussed with counsel at the time that the issue of these  
3 emails, when we came into possession of those emails, the  
4 concerns we had relative to the communications between  
12:22:47 5 Mr. Church, Mr. Scott, and Mr. Spivak were made known to  
6 Mr. DeVillers and Mr. Martin, and also to Mr. Spivak's, I  
7 think, prior counsel.

8 And I think I can fairly say that I'm aware that the  
9 defendants have those emails. Despite us having those  
12:23:11 10 emails and providing them, I think they have them  
11 independently. But obviously, we provided what we had  
12 available to the prosecution team. I think there are other  
13 emails that may involve privilege issues, and that is not  
14 available to the prosecution team, so I don't have it to  
12:23:27 15 turn over.

16 I know that the -- that defense counsel, I guess,  
17 should have been contacted by other folks in our office who  
18 are handling those issues, and we'll work through them.

19 But I guess to Mr. DeVillers' main concern, there  
12:23:45 20 isn't another tranche of -- I don't consider a defendant's  
21 statements *Jencks*. It's discoverable under Rule 16, and,  
22 you know, the notes, the 302s, even though that's  
23 technically a statement of the agent, we provide all of that  
24 up front as part of Rule 16. These emails are no different.  
12:24:05 25 And so there isn't a surprise tranche of documents being

1 held the day before trial as part of *Jencks* or anything.

2 I guess the issues the defendants are raising relative  
3 to *Jencks*, it seems a bit premature. I think I've  
4 represented to the Court what the Government's, in these  
12:24:30 5 types of cases, what our typical practice is, and have tried  
6 to sort of delineate that from -- you know, we've recognized  
7 that us following the, you know, the taking the maximum  
8 amount of time that the law permits to disclose these  
9 materials would be disruptive to the trial. And we have no  
12:24:51 10 intention of doing that. It's just a position -- you know,  
11 the timing of those disclosure are essentially up to our, I  
12 think, you know, thoughtful discretion. It's not sort of a  
13 random decision.

14 There have been issues relative to witness tampering,  
12:25:13 15 at least, you know, the way we see it, and I know that's a  
16 disputed -- that's a disputed issue, obviously. But there  
17 are concerns, and there are concerns for cooperators, should  
18 they exist. And frankly, it's also premature because we  
19 haven't designated our witnesses.

12:25:38 20 Obviously, there are lots of things sort of influx  
21 with the case right now. We're asking the Court to  
22 reconsider some of its rulings, and that would  
23 necessarily -- could change or will change how the  
24 Government presents its case and what witnesses it decides  
12:25:55 25 to put on.



1           So in order that -- you know, if we were having a  
2       final pretrial on the 22nd, and none of the *Jencks* had been  
3       disclosed, as to the Court's suggestion, maybe that would be  
4       a more appropriate time to discuss that we haven't taken the  
12:26:16 5       Court up on its suggestion that we -- you know, its strong  
6       suggestion that we turn over that material by that date.  
7       But we're not there yet. This is the 8th.

8           And the information and the law, the argument that's  
9       made out in the Government's notice is simply it wanting to  
12:26:40 10       be clear as to what it believes its legal obligations are,  
11       and -- but, obviously, the realities on the ground are that,  
12       you know, we don't intend to wait until a witness -- you  
13       know, absent some other circumstance, we don't intend to  
14       wait until a witness testifies to turn over *Jencks*  
12:27:02 15       materials. So I don't think that's necessary.

16           And I think those were mainly the two issues.

17           In terms of, you know, ordering the Government to turn  
18       over *Giglio* forthwith, again, we haven't identified our  
19       witnesses that would be definitely coming to any trial. So  
12:27:28 20       that's kind of impossible for us to do.

21           But we know what those materials are. And I'm happy  
22       to take a look at the materials that Mr. Spivak and  
23       Ms. Smirnova, that their counsel have highlighted, the  
24       letters and notes and documents for cooperators.

12:27:49 25           Obviously, you know, we want to be as cooperative

1 and -- as possible. There's no need to hide the ball on  
2 things. And so, you know, happy to talk to them about it.  
3 Obviously, we haven't had -- I didn't have a chance to look  
4 into all of these things having seen it for the first time  
12:28:14 5 in this response.

6 THE COURT: Well, you raised one of the issues  
7 I wanted to ask you about, and that was concerns about  
8 witness tampering and so forth.

9 My view on that is to the extent you have any material  
12:28:31 10 that you have concerns about ultimately disclosing in that  
11 regard, I would encourage you to submit it for in-camera  
12 review sooner rather than later, as soon as this week, just  
13 given everything on my plate, and I can get through it and  
14 make decisions about whether I think there's that concern.

12:28:47 15 I mean, obviously, you're closer to that, and I give  
16 appropriate deference, notwithstanding the end of the recent  
17 Supreme Court term to the executives' judgments in that  
18 regard.

19 But I think to the extent those are legitimate issues  
12:29:05 20 and concerns, and I agree with you that to some extent, at  
21 least, they are present or potentially present in the case,  
22 so I don't take that lightly here. But given that that's an  
23 issue, I think the sooner I can get some of those materials  
24 and start working through them, the better I can help you,  
12:29:24 25 and by extension, all of you, on that front.

1           The other thing I would say for the moment is that  
2           there were some specific documents that were highlighted in  
3           the briefing and that were raised again in our discussions  
4           this afternoon. What I would say there is, between now and  
12:29:48 5           July 22nd, I'd ask counsel to be working together on that.

6           I think, Mr. Abreu, that's already on your to-do list  
7           based on your comments. But I will request an update on  
8           where that stands at that point in time.

9           And I will just encourage all of you, I think that  
12:30:10 10          it's probably -- I don't want to say -- I'm going to say  
11          this, and I don't -- take me seriously and not literally on  
12          this one, you can't communicate with each other too much on  
13          those issues. Now, obviously, you can at some point. But I  
14          think you need to be communicating on these issues over the  
12:30:34 15          next couple of weeks to move them forward.

16          It sounds like there might be some other issues on  
17          discovery. But not sure what those might be.

18                   MR. AXELROD: Your Honor, if I could just add  
19          one more thing just very quickly.

12:30:52 20          When it comes to *Jencks*, you know, I won't speak for  
21          all the defendants' counsel, but we're not seeking a huge  
22          amount of materials. There are a discrete number of  
23          witnesses. I mean, we're talking theoretically on this  
24          conversation, but we all know there are a discrete number of  
12:31:09 25          the witnesses, largely the codefendants, who have plead

1 guilty, and it looks like they have cooperation agreements  
2 with the Government in this case.

3 And really, what -- and this goes to what  
4 Mr. McCaffrey said. It is very likely that the Government  
12:31:23 5 has spoken to those witnesses multiple times and that the  
6 FBI 302s and other materials will be quite voluminous.

7 And I find it incredulous that the Government has not  
8 identified that it intends to call those people as witnesses  
9 in this case, despite giving them cooperation agreements.

12:31:44 10 And I do not think that there's any reason that the  
11 Government cannot be prepared to produce those *Jencks* --  
12 those *Jencks* materials for those discrete set of  
13 witnesses -- we all know who they are -- very quickly.

14 And then one other thing -- and I'll take the  
12:32:00 15 Government for their word and what they write. In their  
16 second discovery notice, they say that they expect to turn  
17 over *Jencks* material at a minimum on or before the day  
18 before each witness testifies. That's what they wrote.

19 And if that's going to be the case, and we're going to  
12:32:16 20 get a dump of *Jencks* materials, you know, before the first  
21 day of trial and then going through trial, I just think it's  
22 going to be -- I do believe that that is a -- that's going  
23 to be a violation of our clients' constitutional rights to  
24 counsel and to due process. And we will be asking the Court  
12:32:33 25 for long recesses so that we can research what's in these

1        *Jencks* materials. And I think that's completely an  
2        untenable way to run a trial, especially one where, you  
3        know, I do not think that there are credible issues of  
4        danger to the named cooperating defendants in this case who  
12:32:51 5        everyone has known about for -- since 2021.

6                But with that said, you know, I'm quite happy to move  
7        on now.

8                THE COURT: I guess I'll only add one issue.  
9        Although, somebody, I think, was about to speak. Sorry to  
12:33:06 10       interject. I'm not sure who that was.

11               MR. ABREU: Oh, no, Your Honor. It was just  
12       me.

13               THE COURT: Go ahead.

14               MR. ABREU: I'm thinking through at a minimum  
12:33:14 15       and at a maximum, and I don't know if I chose the right  
16       word. But the latest we would turn it over is what the --  
17       you know, at the deadline that the Court -- or that the law  
18       requires. And I think we've been clear that that's not the  
19       way we expect the vast majority of this information -- the  
12:33:33 20       timing of this information to go through. But in terms of  
21       what legal obligations we have, you know, that's the latest  
22       we would turn this information over.

23               THE COURT: So I'll only add a couple of other  
24       things.

12:33:49 25               First, to follow up on that point, I think the

1 Government's position is clear to me.

2 Second, I'll just put on the table, I do think that  
3 there are other considerations that come into play under the  
4 Sixth Amendment. For example, in the fairness of the trial,  
12:34:12 5 I don't think, based on what I know right now, that as we  
6 sit here disclosure of, you know, *Jencks* tomorrow, or on the  
7 22nd would be a problem.

8 However, I think that there is the potential for that,  
9 as we wait in a trial of this complexity and so forth.

12:34:35 10 And I will add as well that the trial's already  
11 expected to take a considerable amount of time. And my  
12 objective as a judge, in addition to making sure that each  
13 of you and your clients receive a fair trial, is to maximize  
14 every minute of the workday possible for the jury to be in  
12:35:06 15 the box.

16 In my experience, they want to be in the box more than  
17 out of the box, even if that means taking very short lunch  
18 breaks. Pack accordingly. And I think that the extent,  
19 later disclosures of any materials are going to interfere  
12:35:26 20 with that, we're going to run into just trial management  
21 problems very quickly, and I want to do everything I can to  
22 avoid that.

23 But I think we've said everything there is to be said  
24 at the moment on that, and do have some immediate short term  
12:35:46 25 work on a to do, and consistent with the orders that, I

1 believe it was Mr. Abreu who referenced them, we'll sure be  
2 talking more about these issues in a couple of weeks.

3 But turning to other discovery issues, then, I'm not  
4 sure exactly what those might be, or whether they're ripe or  
12:36:05 5 so forth. And since they weren't briefed, I'm not sure  
6 Mr. Abreu even knows what they were. But I'm happy to hear  
7 what they might be.

8 MR. MCCAFFREY: Judge, John McCaffrey on  
9 behalf of Ms. Smirnova.

12:36:18 10 This next issue Mr. Abreu is aware of. We were just  
11 made aware of it in the Government's second notice of  
12 discovery status report that was filed on June 20th. And at  
13 page 2 of that filing, Docket Number 334, there was  
14 reference made to the production that I alluded to earlier  
12:36:41 15 that the Government made on June 14th, and then it -- that  
16 the filing then states "That voluntary effort is ongoing, as  
17 the Government continues to identify likely exhibits in  
18 advance of trial and evidence from the data extracted from  
19 computers seized during the execution of a search warrant at  
12:37:04 20 USLG's offices."

21 So this is the first that we've been put on notice  
22 that the Government intended to go back to those devices and  
23 review and use information from those devices.

24 Now, I want to remind the Court, because some of the  
12:37:22 25 counsel weren't involved at that time, but we've ordered the

1 transcript from the proceeding before the Court back on  
2 October 24th. And I can take you to exactly that exchange  
3 between the Court and Mr. Abreu about those materials. And,  
4 I mean, he made it very clear that, you know, if they did  
12:37:47 5 intend to go back and start looking at those materials, that  
6 they would -- you know, that they would make them available.

7 I can -- I'd like to take the Court -- with the  
8 Court's indulgence, show on the screen exactly what the  
9 statement was.

12:38:06 10 THE COURT: All right.

11 MR. McCAFFREY: Okay.

12 THE COURT: Or you can -- what is the ECF  
13 number of the transcript while you're bringing that up?

14 MR. McCAFFREY: Yeah. The -- that is number  
12:38:17 15 342.

16 THE COURT: 342. All right. Thank you.

17 MR. McCAFFREY: Yes. And it's starts -- the  
18 relevant portion starts on page 13.

19 And this is when the Court was considering, you know,  
12:38:30 20 the issue of all the -- that ESI that had been seized.

21 THE COURT: Right.

22 MR. McCAFFREY: And it -- you know, the Court  
23 was even throwing out the idea at the bottom of page 14 --  
24 yeah, right here. "To prepare a witness/exhibit list, but  
12:38:59 25 if you give me both of those in a reasonable period of time,



1 that may facilitate some of the defendants' review."

2 And this is where Mr. Abreu then indicated that -- you  
3 know, that they're in possession of 20 devices. "If we do  
4 end up pulling some of the data off the 20 devices for  
12:39:22 5 trial, we would provide it to the defendants, to TopDocs,  
6 and identify where they came from. But right now, there's  
7 not one piece of data, not one document that comes off those  
8 20 devices that we would use at trial. Everything else has  
9 been provided."

12:39:39 10 So we are now being told on June 20th that it appears  
11 that the Government's going back to one or more of the  
12 devices, which, since this assurance was made back in  
13 October of 2022, we have not focused on those -- on those  
14 devices whatsoever. And we don't know what's coming.

12:40:05 15 THE COURT: All right. Mr. Abreu, happy to  
16 have you speak to those issues.

17 MR. McCAFFREY: One point, Your Honor.

18 THE COURT: Oh, yeah.

19 MR. McCAFFREY: We did have -- we did make an  
12:40:15 20 attempt to have an exchange with Mr. Abreu on this issue.  
21 There were some email exchanges with Ms. Engelmyer on  
22 July 2nd, and Mr. Abreu responded on July 3rd.

23 In his email he says, "I told the Court and the  
24 defendants that if we identified materials we would be using  
12:40:35 25 as part of our case-in-chief, we will voluntarily identify

1 those for the defendants in advance of trial."

2 Again, Your Honor, this is the first time now we're  
3 being advised that they've even gone back to those devices  
4 to look for materials, and/or that they're going to use  
12:40:54 5 documents from those seized devices in this trial.

6 THE COURT: All right. Thank you.

7 Happy to have you respond, Mr. Abreu.

8 MR. ABREU: I have to choose my words  
9 carefully so that they don't end up on the screen next week.

12:41:15 10 Thank you, Your Honor.

11 I don't think I said anything different at that  
12 hearing. I didn't have the benefit of the transcript when I  
13 responded to Ms. Engelmyer. But my recollection of what I  
14 said, I think, matches up with what Mr. McCaffrey put up on  
12:41:30 15 the screen, which was that, although I can't commit to it at  
16 this point -- and that was over a year ago. That was in  
17 2023 -- that we weren't going to use any of the information,  
18 any of the data from those computers.

19 But right at that point, there was no intention to.

12:41:49 20 And if there was information off of those computers -- and I  
21 think what I put in the notice was from the data extracted  
22 from the computers seized during the execution of the search  
23 warrant at USLG's offices.

24 So this is the data that was provided in discovery,  
12:42:06 25 not even whatever else is on the computers that we gave

1 defendants access to, but they didn't want the images  
2 themselves, the FTK images. That if we were going to use  
3 anything from that production, that we would specifically  
4 call it out.

12:42:26 5 And I think that I represented that because I  
6 recognized that it was a lot of loose data, so to speak,  
7 from 20 different computers. And so I don't intend on  
8 surprising the defendants. But I don't think that I said we  
9 are never looking at these computers, and as soon as we look  
12:42:48 10 at these computers, that we had, you know, lawful authority  
11 to seize and search, that we would notify you so that you  
12 could start paying attention to them.

13 They -- the defendants asked for that data, and we  
14 provided it. I -- whether they looked at it or not, I guess  
12:43:05 15 it's -- you know, that's their strategy. But I merely put  
16 in our notice what I mentioned we would do. If we did  
17 identify evidence extracted from the computers, we plan to  
18 specifically call them out.

19 The data has the metadata to allow us to inform the  
12:43:29 20 defendants which computer item that came from. They have  
21 the map of the -- from the search of the offices, and they  
22 will be able to match the computer to the specific location  
23 where it was seized from, and -- but, you know, presumably,  
24 they know who worked in those spaces and will know whose  
12:43:52 25 computers they are. There might be other data in the

1 computers that would identify that user as well.

2 But, again, I think what I've said is consistent with  
3 what I said before, which is that we're not trying to  
4 blindside them, and that we would call out that information  
12:44:07 5 if we were going to use it.

6 MR. McCAFFREY: May I respond, Your Honor?

7 THE COURT: Sure.

8 MR. McCAFFREY: I want to go back to the  
9 transcript from October of 2022.

12:44:16 10 Continuing in the same paragraph, Mr. Abreu said, "So  
11 in terms of the exhibits at trial, broad brush, it doesn't  
12 include any of this," referring to the 20 devices.

13 And I don't know that we have all the 20 devices,  
14 Your Honor.

12:44:37 15 He goes on to state that "I think that may answer your  
16 question, at least in preparing to counter the Government's  
17 evidence, how useful the devices are going to be to the  
18 defendants, the time and effort they might want to take to  
19 review them.

12:44:54 20 "You know, I'll mention, Judge, that we've offered  
21 it -- it's been a few months, I think, since we offered  
22 those devices, at least two. No one's taken us up on the  
23 offer, so no one knows what's in them because they haven't  
24 looked at them."

12:45:10 25 And I mean, we took the Government at its

1 representation that it was not going to use any -- use any  
2 exhibits from those materials. And certainly, that if that  
3 changed, we would be provided with notice, at least as to  
4 what devices then we could get copies or confirm that we had  
12:45:29 5 a copy of -- I think there were 20-some devices that were  
6 seized during that search.

7 So, again, Your Honor, this is the first notice that  
8 we got, was back on the filing on June 20th of this year.

9 THE COURT: On this issue, I'll just say two  
12:45:56 10 things, perhaps.

11 So I do remember, for better or for worse, this issue  
12 and this series of conferences pretty well. I do recall  
13 quite clearly the representation, which Mr. McCaffrey put on  
14 the screen, that these were devices that were at issue that  
12:46:17 15 were not likely to be the source of evidence to be  
16 introduced at trial.

17 Frankly, that was a fact that entered into the way I  
18 approached those issues. Because if that fact had been  
19 different, I might have made different decisions at the  
12:46:38 20 time, I might not have. I just don't know. I can't,  
21 obviously, turn back the clock and kind of work through that  
22 all again. But that did inform how I approached that issue  
23 at that time.

24 The other thing I would say is that July 15th is the  
12:46:55 25 current deadline for exhibits. So I think we'll have

1 definitive clarity a week from now on what the Government  
2 intends to use from that, if anything. So that's another  
3 issue we can revisit on the 22nd.

4 With some trepidation, I asked if there's other  
12:47:15 5 discovery issues you need to put on the table at this point.

6 MR. AXELROD: Your Honor, just one. And this  
7 is also an issue that --

8 THE COURT: I thought I heard references to  
9 issues, plural, and not just one other one. But okay.

10 12:47:26 MR. AXELROD: Just one another one, and this  
11 is an issue that we have corresponded with Mr. Abreu about.

12 While preparing for trial, I found one -- at that  
13 time, I found one clearly privileged communication between  
14 Paul Spivak and a lawyer representing him in an SEC  
15 12:47:46 investigation.

16 At that time, we sent a letter to Mr. Abreu asking the  
17 following questions: Where the privileged communication was  
18 seized from, who reviewed the privileged communication,  
19 whether Mr. Abreu or anyone else involved in prosecuting the  
20 12:48:00 case had seen the privileged communication, whether  
21 Mr. Abreu or anyone else involved in the case had talked to  
22 anyone about the contents of the privileged communication,  
23 whether the United States had reviewed other privileged  
24 communications, and what steps the Government had taken to  
12:48:16 25 ensure that privileged materials were not improperly viewed,

1 seized, or retained during the course of the investigation  
2 or prosecution.

3 I sent that letter on June 18th. Since that time,  
4 Mr. Abreu responded, told me he had no answers. And I've  
12:48:32 5 gotten no information from him about any of these issues.

6 Today, I heard some reference to some type of team,  
7 but Mr. Abreu never told me about that before. I suspect  
8 that that is a completely new development.

9 But I will tell you that since sending that letter, we  
12:48:50 10 have now identified 200 privileged communications that the  
11 Government has produced in discovery. It looks like the  
12 Government took no effort whatsoever to protect my client's  
13 attorney-client privilege. And these are germane matters to  
14 this prosecution. They involve communications with lawyers  
12:49:08 15 during the conspiracy. But they also involve communications  
16 with lawyers who were representing USLG and Paul Spivak in  
17 the SEC's related investigations.

18 And, you know, if I provided these to Your Honor in  
19 camera, these are not the type of communication you would  
12:49:26 20 say, "Well, okay this -- maybe this is privileged." These  
21 are like, you take a look at the document, this is a -- this  
22 is a privileged document.

23 And at this point, I can't get any answers from the  
24 Government about what it did to protect my client's  
12:49:37 25 attorney-client privilege. And so, you know, at some point

1 soon, I'll be filing a motion to compel, or some other type  
2 of motion. But since we have you on the phone today, and  
3 Mr. Abreu raised this issue previously, I thought it made  
4 sense just to tell you where we're at so this won't surprise  
12:49:54 5 you when I file a motion to compel because I can't get  
6 answers from the Government.

7 THE COURT: All right. Thank you.

8 Mr. Abreu, happy to have you speak or decline to do so  
9 as you see fit at this point in time.

12:50:06 10 MR. ABREU: Thank you, Your Honor.

11 Yeah. I can speak to some of it. I don't think -- I  
12 mean, potentially, the fact that there is a filter team and  
13 a filter review might be new to Mr. Axelrod, as the second  
14 lawyer on the case for Mr. Spivak. But I don't think that  
12:50:29 15 that was a secret.

16 Mr. Spivak received a copy of his own phone, which  
17 indicated that all of the privileged materials from that  
18 phone had been removed.

19 There -- the Government has taken steps -- the delay  
12:50:48 20 in getting them a response was that I was supposed to be in  
21 trial on July 1st and I'm not, thankfully, or I wasn't. And  
22 there are other individuals in our office that are separated  
23 from the prosecution team that need to answer some of those  
24 questions relative to the one document that Mr. Axelrod  
12:51:09 25 referenced. I don't know anything about the other 199, or



1 who had them and how we got them.

2 I will note that Mr. Spivak sent a lot of  
3 correspondence to the SEC, including a lot of communications  
4 with his own lawyers, and -- in response to SEC's subpoenas  
12:51:29 5 or as part of his correspondence with the SEC for various  
6 issues.

7 So I don't know what those documents are. I don't  
8 know exactly what the document is that the defendants  
9 mentioned was privileged. I know it came from a production  
12:51:51 10 that indicated it was from a thumb drive that was received  
11 from Susan Tubbs, a former employee of USLG. And that that  
12 was provided to us by Ms. Tubbs, and she was represented by  
13 counsel.

14 So it's not something that -- that one document, I  
12:52:12 15 don't know who was on the -- I didn't even ask Mr. Axelrod  
16 or Ms. Engelmyer for sort of the privilege log information  
17 you would want, right, who sent it, who it was to and what  
18 the subject was. I simply sent it to our filter -- our  
19 filter team, and they will be coming up with a response.

12:52:35 20 In terms of who's looked at it, no one from the  
21 prosecution team has looked at it. I haven't looked at it,  
22 the agents haven't looked at it. And so they'll get all of  
23 those -- all of that information. But, you know, that was  
24 part of a production that was made by the United States on  
12:52:55 25 June 30th, 2023. And out of that entire production, there

1 was one document that the defendants have claimed privilege  
2 over.

3 And I will say based on just what was included with  
4 the discovery letter on the subject of the -- of that email,  
12:53:19 5 or at least the document title, there are other  
6 communications with that purported attorney that the  
7 defendants haven't claimed privilege over.

8 So, again, I don't know what's in there. I don't know  
9 what significance it has. But to the extent that there's  
12:53:38 10 any concern that the Government has not taken steps to  
11 protect Mr. Spivak's privilege, I think that's false. I  
12 think the Government has. And especially in a case where  
13 Mr. Spivak is charged with his wife, the Government has been  
14 mindful, even of the spousal privilege. And so we have  
12:53:57 15 taken those steps. I think we'll be able to work that out  
16 with the defendants and at least sort of, you know, go  
17 through what we've gone through.

18 If there are other documents that they believe are  
19 privileged, I would encourage them to let us know in the  
12:54:13 20 form of a, you know, log. Obviously, I don't want the  
21 communications. But if they want to tell us the Bates label  
22 and, you know, who it was from, who it was to, and the  
23 subject, I'm happy to put them in touch with our filter  
24 attorney, and they can -- we can work through those issues.  
12:54:31 25 And if there's a problem, then, obviously, they can raise it

1 with the Court.

2 But I'm just not prepared to speak to those issues  
3 because this is the first time I'm hearing about them today.

4 MR. AXELROD: You know, Your Honor, I wrote a  
12:54:45 5 letter three weeks ago, and this is the first time I've  
6 heard any of this information. And frankly, none of it  
7 makes sense. The documents that -- we found, you know, over  
8 200 privileged documents that are clearly privileged on  
9 their face. So I don't know how those were removed from the  
12:55:02 10 production before when we have them.

11 And I guess I'm just at a complete loss because I  
12 don't see any protection that was provided to Mr. Spivak's  
13 privileged communications. I'm aware of none. I received  
14 none after receiving a -- writing a letter to Mr. Abreu.  
12:55:17 15 And I'm happy to review what those protections are, but I  
16 can't seem to get an answer from the Government.

17 THE COURT: So to me, this is another issue  
18 that I think you, obviously, have a lot to talk about and  
19 should be communicating pretty constantly in the next few  
12:55:38 20 days about to try to run this to ground.

21 Subject to my earlier admonition saying you can't  
22 communicate enough about this coming up, but I'll add it to  
23 my agenda to ask for an update to July 22nd. And but  
24 otherwise, I don't certainly have any information.

12:56:01 25 You're all still in process, and I certainly have less

1 information than you all. So I think you need to spend some  
2 time figuring it out before I interject myself into that set  
3 of issues.

4 MR. AXELROD: Understood.

12:56:16 5 And that was the last additional discovery issue I had  
6 for the Court.

7 Thank you.

8 THE COURT: All right.

9 Mr. ROSEN: I guess I'll jump in.

12:56:31 10 Judge, I had one issue, and I, quite frankly, didn't  
11 intend to raise it today. But we're going down that lane,  
12 and I don't want it to be how come you didn't say anything?  
13 So I'm saying something.

14 And Mr. Abreu and I have been in some brief  
12:56:46 15 communications about it. But I have made a request for a  
16 copy of the seized phones and computer devices. The Court,  
17 of course, denied my motion to suppress. So now that I  
18 don't have access to it, I've asked Mr. Abreu. I gather he  
19 has been busy on this other matter. He did write back and  
12:57:04 20 say I just haven't gotten to it yet. I'm just raising it  
21 because we're raising issues.

22 So if Mr. Abreu is able to get back to me on it,  
23 that's great. But I do want it, I guess, on the record that  
24 I had made that request by way of a written communication  
12:57:22 25 with the Government.

1 THE COURT: All right. Thank you.

2 I want to move on to a couple of other issues that I  
3 wanted to make sure to address.

4 So there's a motion that the United States filed for  
12:57:35 5 reconsideration on severance bifurcation, that broad topic.  
6 It's Document Number 339.

7 Mr. Abreu, happy to have you speak to it beyond what's  
8 in the motion. But otherwise, I certainly have thoughts on  
9 it.

12:57:54 10 MR. ABREU: Thank you, Your Honor.

11 Aside from what's in the motion, I don't have much  
12 more to say. I know that I briefly spoke to Mr. McCaffrey.  
13 And I didn't have a chance to reconnect with him and  
14 Mr. Axelrod and Ms. Engelmyer to get their understanding.

12:58:15 15 I think initially when we received the Court's order  
16 for the trifurcation of the trial, I understood it to be a  
17 three-phase trial with one jury deciding all three phases.  
18 And I believe at the time Mr. McCaffrey thought it was three  
19 different juries deciding three different trials sort of  
12:58:38 20 back to back. And I know we both had concerns. But I won't  
21 speak for John. Maybe his concerns have been allayed.

22 But, obviously, that raises some particular challenges  
23 for the United States, which I know the Court has considered  
24 some of those challenges, and -- but in light of  
12:59:01 25 Mr. Bongiorno's request to -- for a continuance, it would

1 appear that if Mr. Bongiorno were severed from the trial,  
2 then the prejudice that at least the Court ruled existed in  
3 its order would no longer be present, and we could just have  
4 a bifurcated trial with, you know, Counts 1 and 2 together,  
12:59:29 5 and then either 49, or any of the obstruction counts, should  
6 those be reinstated, or not, right, that that would be  
7 handled in the second phase. And although, again, that  
8 creates some complexities, it creates, at least from an  
9 evidentiary standpoint, less than bifurcating Counts 1 and  
12:59:56 10 2.

11 And I think when -- during argument when we talked  
12 about it, Your Honor, at least the United States' approach  
13 was -- and what I had given some thought to was relative to  
14 Mr. Bongiorno. And I know that Mr. Axelrod made an oral  
13:00:14 15 motion to -- and the Court discussed it in its order -- the  
16 oral motion to bifurcate 1 and 2 because it would prejudice  
17 a defense, and -- but that wasn't -- I wasn't -- it wasn't  
18 clear from the order that the Court found prejudice relative  
19 to Mr. Spivak's request for the Count 1 and Count 2  
13:00:37 20 bifurcation.

21 And if the Court was inclined to sever Mr. Bongiorno,  
22 then we would request, Your Honor, a chance to be able to  
23 brief the issues as to why Counts 1 and 2 being tried  
24 together does not prejudice Mr. Spivak, and that they should  
13:01:05 25 be tried together. Just because I don't think we fully

1 explored that issue during argument because that's not an  
2 issue that was briefed, and the only prejudice that was  
3 raised was prejudice to -- a potential prejudice to a  
4 defense, which I'm not sure is cured by separating Counts 1  
13:01:23 5 and 2, the two conspiracies from each other.

6 And so my intent was to have a conversation with  
7 Mr. Axelrod, Ms. Engelmyer, Mr. McCaffrey, and Izaak --

8 Sorry, Izaak. I wasn't going to try to pronounce your  
9 last name right now.

13:01:44 10 -- to see what their positions were on that issue.  
11 But I guess that really depends on whether the Court was  
12 going to sever Mr. Bongiorno, who, based on the filing  
13 Mr. Rosen made, seems to present some good cause for  
14 delaying his trial.

13:02:05 15 And so that's why we raise the issue now, just so that  
16 it wasn't a surprise to the Court at this juncture, that we  
17 would be making that request.

18 THE COURT: Well, why don't we fast forward to  
19 that motion, then, return to this one.

13:02:25 20 So, Mr. Rosen, happy to have you speak to your motion  
21 to continue the trial, which I have read, and I've read the  
22 supporting documents and exhibits and so forth. But happy  
23 to hear further from you.

24 MR. ROSEN: Yes, sir.

13:02:39 25 Well, first of all, Judge, thank you for allowing me

1 to file it under seal. Obviously, it's very sensitive  
2 information, and just so the Court knows, I, of course,  
3 obtained Mrs. Bongiorno's permission to do that. That was  
4 very important to me.

13:02:57 5 And you may or may not remember, Judge, back on our  
6 hearing on April 25th, I -- when we were having -- actually,  
7 I think it was outside of everybody else being there, there  
8 was an issue with Mr. Bongiorno and pretrial services. And  
9 I actually referenced the fact that I may be filing a  
13:03:16 10 motion.

11 This whole situation, obviously, has been going on and  
12 known to me, of course. It's clearly impacted my ability to  
13 represent Mr. Bongiorno. I will say that to the Court.  
14 Many days will go by when we're supposed to speak. And when  
13:03:37 15 I finally do hear from him, it's been, you know, my wife's  
16 been in the hospital, and, you know, all those things are in  
17 there.

18 The hope, of course, is that with the surgery that's  
19 now scheduled, I think, for August 6th, that's going to  
13:03:52 20 alleviate a lot of her issues. And then followed up with  
21 the protocols and procedures on her spine that all came from  
22 this car accident, you know, I didn't know who was going to  
23 doubt or challenge it, so I put a lot of stuff in there, the  
24 windshield, and the Geico claim, and all of that stuff.

13:04:13 25 So, of course, my request first was, can we continue



1 the entire trial?

2 Obviously, that impacts on everybody. And I think I  
3 received Mr. Abreu's response the day before I was going to  
4 file it. I kept -- as the Court can tell, getting these  
13:04:37 5 kinds of exhibits aren't easy, and that was one of the  
6 delays. I kept having to deal with hospital records and  
7 doctors' authorizations and so on to get this. And then I  
8 saw Mr. Abreu's comment that how the Government -- how this  
9 is impacting on the Government.

13:04:53 10 So my request is that Mr. Bongiorno have his trial  
11 either postponed -- and I picked March. I did that,  
12 obviously, for several reasons, Judge, and I'm sure you're  
13 scratching your head, like, really? March? But I wanted to  
14 give the family an opportunity to heal.

13:05:17 15 You know, her kidney issues, which, you know, just  
16 layer onto all of this is obviously a chronic situation.  
17 And so the hope is that that's going to be far more capable  
18 of being dealt with by virtue of having her spine and her  
19 chest, the surgeries taking some relief there.

13:05:40 20 So either -- I'm asking the Court to either continue  
21 the trial -- and there are certainly enough issues floating  
22 around at the moment, discovery issues, or that  
23 Mr. Bongiorno gets severed, tried alone, so that these  
24 unusual, if not unique circumstances, can be addressed. And  
13:06:00 25 I just -- I guess I want to impact with the Court the fact

1 that Chris has had very little opportunity to really work  
2 with me because of all these issues.

3 I also included the child custody issue. Obviously,  
4 not a medical issue. But I wanted the Court to understand  
13:06:17 5 the dynamics of what's been happening with this family for  
6 six months. You know, the perfect storm of horrible things  
7 could happen, he's been living it.

8 So I'm asking the Court to, unusual request, to grant  
9 either a continuance or a severance.

13:06:34 10 THE COURT: So let me work backward a bit and  
11 preface everything with, it is difficult from where I sit to  
12 imagine Mr. Bongiorno and his family dealing with much more.  
13 He's certainly got a lot going on.

14 Regarding the custody battle, that's on appeal at the  
13:06:55 15 moment, so there's not much to do, in any event. So I don't  
16 really give that all that much weight. I know it's hanging  
17 over the family, as I'm sure this indictment is as well.

18 The schedule -- the surgery, as you say, is scheduled  
19 for August 6th. The trial is currently scheduled to start  
13:07:15 20 on August 12th so he would have the ability to be present  
21 for the surgery and so forth.

22 The one thing I don't see in the motion papers and the  
23 like is any representation even that he's the only person,  
24 the only family member, the only friend who is able to  
13:07:32 25 provide some support and assistance to his wife as she

1 recovers from surgery.

2 MR. ROSEN: So let me address that, Judge.

3 Mrs. Bongiorno's father lives with them. He has had,  
4 I think, two or three strokes, and -- because I just did not  
13:07:54 5 want to get into his medical issues and layer that in here.  
6 Short of that, there is actually nobody else in the family  
7 that is capable of taking care of the one-year-old, and, of  
8 course, Mrs. Bongiorno at the same time. His parents live  
9 up in the far northeast, and I think they have their own  
13:08:22 10 medical issues that they have been attending to.

11 So that's the reason why I didn't add something in  
12 there about it, because, you know, I was not unaware of what  
13 I didn't include. But those would have been it. And  
14 because of the medical issues of both sides of those family  
13:08:41 15 members, that was the only place they could go.

16 So that was -- that was the primary reason I didn't  
17 include it. But I'm glad the Court raised it because it's a  
18 notable factor.

19 But, again, the father would be the one there, but he  
13:09:02 20 is physically incapable -- I mean, I've met the man. He is  
21 physically incapable of taking care of her or, of course,  
22 the one-year-old.

23 THE COURT: So one thing I've learned from  
24 watching the Browns over the years, it can always get worse,  
13:09:17 25 and you just made it worse. So thank you for that.

1           The one thing I also need to ask you about is  
2       Exhibit 8 where it's one of the physicians involved in care  
3       and treatment of Mr. Bongiorno's wife indicates that there's  
4       a broader support system that she has, that he is one part  
13:09:35 5       of that. So it does sound like there's additional support  
6       and resources there to help in that period, where we start  
7       trial currently as scheduled on August 12th.

8           DEPUTY CLERK: So if I remember, Judge, and  
9       I've lost my Internet so I can't access a lot of the  
13:09:56 10       documents here.

11           THE COURT: See, it always gets worse.

12           MR. ROSEN: Workarounds are what we have to  
13       do.

14           If I recall Exhibit A, that was, I think, from the  
13:10:06 15       original doctor back in 2022. And that doctor -- well, it's  
16       irrelevant. They switched doctors for a lot of reasons.  
17       But to answer the Court's question, I think I have. It  
18       would have been her father, and he is truly incapable of  
19       doing it. So -- and it would have been his parents that  
13:10:33 20       have their own medical issues going on, and they live, I  
21       think, in Vermont.

22           So we certainly looked at the possibility of having  
23       anybody do this. I mean, that was, obviously, the  
24       situation. And the other part of it was, I think that the  
13:10:51 25       nurse, who is a chiropractor who had been treating her, had

1 talked about six months, and I think the surgeon talked  
2 about three months of, you know, her not being able to do  
3 anything. So I don't know if the Court wanted me to comment  
4 on that.

13:11:10 5 But I mean, the distinction between those two time  
6 periods was, the surgeon was looking at it for her own  
7 capabilities and what she couldn't do from the surgery. The  
8 chiropractor nurse, registered nurse, was looking at it from  
9 a broader time frame of after the surgery, she still has  
13:11:33 10 spinal issues to deal with.

11 So there was a broader view from the chiropractor and  
12 the nurse than the surgeon, who had a three-month time span  
13 of her not being able to lift anything of any significance  
14 as she's recovering.

13:11:51 15 So we were talking about -- I'm not sure what the  
16 length of this trial is going to be. I mean, I'm thinking  
17 personally, one to two months is my ballpark time frame,  
18 when you factor in defendants and defenses and so on.

19 So it was simply not somebody that we had an ability  
13:12:11 20 to turn to.

21 MR. ABREU: Your Honor.

22 THE COURT: Just one second.

23 So the doctor was Amanda Alley in a letter signed on  
24 June 19th of this year referencing a broader support  
13:12:27 25 network.

1 But I'm not sure who I cut off. Sorry.

2 MR. ABREU: Oh, Your Honor, sorry about that.

3 I only wanted to make it worse.

4 THE COURT: Good. Good.

13:12:37 5 MR. ABREU: And it doesn't exactly go to  
6 Mr. Bongiorno's motion. But I think I'd incur the wrath of  
7 the Court more than I ordinarily do by waiting too long to  
8 tell the Court that I'm leaving the office soon, before  
9 August 12th, and so the office is in -- we are preparing to  
13:13:04 10 transition my responsibilities in this case to another AUSA,  
11 or AUSAs. And I likely would be making a motion to continue  
12 independently as well.

13 And I didn't want to wait too long to tell you that,  
14 Judge, as you consider Mr. Bongiorno's motion.

13:13:32 15 THE COURT: So many questions, but I want to  
16 ask them on the record. But I appreciate the notice on  
17 that. Thank you.

18 Let me put a couple of other things on the table,  
19 given that eventuality.

13:13:54 20 First, let me turn back to the original  
21 reconsideration motion that we had a little detour on to  
22 deal with Mr. Bongiorno and his unfortunate circumstances.

23 But I wanted to make sure, Mr. McCaffrey, Mr. Axelrod,  
24 that it sounded like you might have had some discussions or  
13:14:22 25 perhaps aborted discussions with Mr. Abreu. I just wanted

1 to make sure that you all were clear on kind of what the  
2 proposal I had outlined in the omnibus ruling was.

3 MR. AXELROD: Yeah, Judge. This is  
4 Dave Axelrod. I'll just add, I have not spoken to Mr. Abreu  
13:14:47 5 about the trial proposal, and ever since you issued it on  
6 5-31, we have been engaged in preparation for a trifurcated  
7 trial, and have spent great effort doing so.

8 MR. McCAFFREY: I've had no communication with  
9 them.

13:15:08 10 And, Alex, I'm shocked. Man, I wish -- wish you the  
11 best.

12 THE COURT: So I take it that means you're not  
13 going to Tucker Ellis.

14 MR. McCAFFREY: Having just --

13:15:18 15 THE COURT: But we don't need to talk about  
16 that on the record.

17 MR. McCAFFREY: Having just stolen one person  
18 from the office last month.

19 THE COURT: The thought crossed my mind, but  
13:15:28 20 we don't -- we don't need to have that discussion now.

21 Let me do this. So here's my view of the  
22 reconsideration issue. And I'll take it in two -- three  
23 steps.

24 The first step is just to clarify that, in my view,  
13:15:45 25 the jury trial right is to have the case tried to a jury.

1 That's one jury. So I think one jury has to decide all the  
2 issues, whether it's at one phase, three phases, or 16  
3 phases, or whatever structure ultimately makes the most  
4 sense in any given case.

13:16:05 5 In terms of the structure that I outlined in the  
6 order, I think there were many factors that went into that.  
7 So it was not simply either the potential of prejudice,  
8 given the potential predisposition defense on Count 2 that  
9 we talked about there, and that was that one subject  
13:16:41 10 addressed in the ruling, it was not just a potential for  
11 prejudice to Mr. Bongiorno, or anyone else, but there were a  
12 host of considerations that went into that.

13 And I do want to, Mr. Abreu, give you some assurance  
14 that I did not take the comment about the chronological  
13:17:05 15 presentation of evidence to mean that the evidence neatly  
16 segregated into Counts 1 or 2. I think that's -- I never  
17 thought that was the case, and that presents different  
18 issues.

19 But one of the issues that I really have very great  
13:17:23 20 concern about is the potential for confusion on the jury.  
21 And I did include some discussion of that in that ruling.

22 All of that said -- and this will be my final point on  
23 that -- Mr. Abreu, you had indicated in the briefing and  
24 again today that you were interested in an opportunity fully  
13:17:44 25 to brief that issue. So, I mean, you're certainly entitled



1 to make a record, you know, so I would encourage you to do  
2 that if that's what you want to do.

3 I will say, I came into the proceedings today, based  
4 on review of that motion, as well as Mr. Bongiorno's motion,  
13:18:06 5 inclined to deny both. That's how I remain. I remain of  
6 that view. However, there's a little bit of additional  
7 information that Mr. Rosen has provided, and there's some  
8 additional information that you've provided as well. And so  
9 I do need to think that through a little bit.

13:18:26 10 And the only other comment I'll put on the table about  
11 any of it, you know, the work, in my experience, for lawyers  
12 tends to expand to fill the amount of time you have, and so  
13 I'm mindful of that.

14 Do you have any sense, Mr. Abreu, who is stepping into  
13:18:53 15 your role on this case?

16 MR. ABREU: I believe they've identified at  
17 least one AUSA that is likely to, Your Honor, but --

18 THE COURT: No one is willing to voluntary for  
19 a tour of duty, right?

13:19:09 20 You don't have to comment on that.

21 MR. ABREU: Yeah. Fair enough. Fair enough,  
22 Judge.

23 I don't exactly know. I actually asked this morning  
24 if a decision had been made, and it's -- I've been told that  
13:19:22 25 that decision will be coming shortly.

1 MR. McCAFFREY: Is that in addition to the two  
2 AUSAs that have already entered an appearance?

3 MR. ABREU: I don't think anybody else has  
4 entered a appearance.

13:19:35 5 MR. McCAFFREY: Yeah, there were. I think  
6 there were two -- there were two AUSAs that had entered an  
7 appearance in this case. I'm --

8 Izaak, help me. Who's --

9 THE COURT: So at the moment, my records, for  
13:19:55 10 what it's worth, although, I'll say I work for the  
11 Government, so this may not be entirely accurate. But as  
12 far as I can tell, Mr. Abreu is the only counsel of record  
13 for the United States.

14 MR. McCAFFREY: Oh.

13:20:09 15 MR. AXELROD: I think that's right. I'm  
16 looking at the ECF, and I think that's right as well.

17 Though, I think what Mr. McCaffrey might be  
18 referencing is on multiple communications with the U.S.  
19 Attorney's Office, specifically about the reverse proffer  
13:20:23 20 that took place a couple of weeks ago, there were two other  
21 AUSAs involved. And I think from our prospective, we  
22 thought that that was the prosecution team.

23 THE COURT: Then I'll wait to be surprised as  
24 to who it might be.

13:20:43 25 MR. ABREU: Thank you, Your Honor.

1 MR. DeVILLERS: Your Honor, may we brief this  
2 issue as well?

3 THE COURT: The bifurcation issue?

4 MR. DeVILLERS: Yes, Your Honor.

13:20:57 5 THE COURT: Yes. So let me ask one broader  
6 question.

7 So, again, coming into the hearing, kind of my  
8 sensibilities were -- I say this lovingly having been in  
9 your shoes all too often. This is the phase of, "Oh, my  
13:21:17 10 gosh. I can't believe we have to try this case in a month,  
11 and there's a lot of work to do." And, you know, it's the  
12 bargaining phase where we've got to get out of this.

13 So part of my view was, we just got to push through  
14 and hold the trial date, which he -- at least Mr. Rosen saw  
13:21:35 15 in a couple of orders. That's still my gut instinct.

16 But under the circumstances, do you have views as to  
17 whether we should be planning on August 12 or not?

18 I mean, I will say, part of the issue from my  
19 perspective is that I've held the dates open, I've scheduled  
13:21:54 20 accordingly to the prejudice of other litigants and cases,  
21 but happy to get your thoughts, given the totality of  
22 information and issues we're working through.

23 I think I know Mr. Abreu's view, which is he doesn't  
24 care very shortly.

13:22:16 25 MR. DeVILLERS: Your Honor, Mr. Scott's view

1 is he would prefer to go to trial as scheduled.

2 MR. AXELROD: And, Judge, this is Dave  
3 Axelrod.

4 And I think, you know, I need to talk to my client and  
13:22:28 5 confirm this because this is all new information. But I  
6 assume that his interest is going to trial, too. They've  
7 been waiting, and I think that that would be their -- they  
8 would like to push forward -- or he would like to push  
9 forward. I won't speak for Mr. McCaffrey.

13:22:49 10 Mr. ROSEN: Judge, you know my position.

11 THE COURT: I do.

12 Mr. McCaffrey.

13 MR. McCAFFREY: Yeah. I would need to talk to  
14 Ms. Smirnova about it.

13:23:02 15 THE COURT: All right. So let's do this. For  
16 the moment, we'll leave the trial date set as scheduled. I  
17 won't rule on Mr. Rosen's motion on behalf of Mr. Bongiorno.

18 To the extent that anyone wants to file briefs either  
19 on the issue of trifurcation that Mr. Abreu put on the table  
13:23:20 20 in his motion for reconsideration, which was Document  
21 Number 339, from -- given what's on my plate and everything  
22 I'm working through, I would say, if you could get those to  
23 me by Friday, that would be ideal. Monday at the latest.  
24 And by Monday at the latest, I mean, probably, like, open of  
13:23:43 25 business Monday at the latest.

1           And if you want to include in that positions, you  
2           know, Mr. Axelrod, Mr. McCaffrey, having talked to your  
3           clients about whether we should proceed on August 12th or,  
4           perhaps, move back a couple of weeks or what have you, we  
13:24:04 5           can figure all that out.

6           But the sooner you can get me briefs on those issues,  
7           the better.

8           And I know Mr. Rosen's position, so you don't need to  
9           give me another brief.

13:24:16 10           MR. McCAFFREY: Judge, I'll just tell you, if  
11           it's a continuation of only a couple of weeks, I'm going to  
12           have -- I've got -- I've got my son's wedding outside of --  
13           it's in a completely different state.

14           MR. DeVILLERS: And I have a trial in front of  
13:24:34 15           Judge Watson, Your Honor, in early October, second week in  
16           October.

17           THE COURT: Well, that's one of the issues. I  
18           mean, I indicated that I scheduled with this trial date for  
19           some time, and I know others have as well. So I don't mean  
13:24:51 20           to prioritize, you know, my schedule and so forth above  
21           yours. But that would certainly be one issue we have to  
22           deal with.

23           And we will plan to keep the hearing, final pretrial  
24           conference on the 22nd. And I do think under the  
13:25:09 25           circumstances, it makes sense to do all that in person.

1 Are you still going to be with the office at that  
2 point, Mr. Abreu?

3 MR. ABREU: Yes, Your Honor.

4 I might be in trial, but I will be here.

13:25:22 5 THE COURT: Well, in any event, you might want  
6 to bring or send counsel who is stepping in, and they can  
7 figure out what they're walking into, and you might be safer  
8 in trial.

9 MR. ABREU: I think that's right, Your Honor.

13:25:35 10 THE COURT: Anything else we should try to  
11 accomplish today?

12 There might be other issues that you all have. That  
13 was everything on my list. That was a small list.

14 But anything else we should address?

13:25:47 15 Mr. Abreu?

16 MR. ABREU: Nothing else on behalf of the  
17 United States. No, Your Honor.

18 THE COURT: Mr. Axelrod?

19 MR. AXELROD: Your Honor, just briefly one  
13:25:57 20 issue. You know, I looked at your -- because there's no  
21 motion for reconsideration in the criminal, quote/unquote,  
22 system, I looked at your local rules with respect to motions  
23 for reconsideration -- and, you know, I'll paraphrase. You  
24 said if you think a motion for reconsideration requires  
13:26:15 25 response briefing, you'll let us know.

1 I was kind of operating under that procedure for  
2 Counts 48 and 50.

3 But tell me if I got it wrong and if you'd like a  
4 response.

13:26:26 5 THE COURT: I think that's up to you. I think  
6 if there's anything you would like to say, you can certainly  
7 address it.

8 As I indicated, I haven't even read it yet, so I don't  
9 know what it says, or what I might have to do with it. So  
13:26:41 10 that's one of the things I will be turning to in the next  
11 couple of days.

12 My general view is that reconsideration motions don't  
13 require a response. So if you don't respond, I'm not going  
14 to take anything from that.

13:26:56 15 MR. AXELROD: Okay. Thank you.

16 THE COURT: Mr. McCaffrey, anything else on  
17 behalf of Ms. Smirnova?

18 MR. McCAFFREY: No, Judge.

19 Thank you.

13:27:03 20 THE COURT: All right. Mr. DeVillers?

21 MR. DEVILLERS: No, Your Honor.

22 THE COURT: Mr. Rosen?

23 MR. ROSEN: Thank you, Judge.

24 No.

13:27:12 25 THE COURT: All right. Well, I will see you

1 all -- I believe we're in person in a couple of weeks. So  
2 I'll plan to see you then.

3 You know, maybe Mr. Abreu, maybe not.

4 But I'll see you in a couple of weeks.

5 Thanks.

6 MR. AXELROD: Thank you, sir.

7 MR. ABREU: Thanks, Judge.

8 MR. DeVILLERS: Thank you, Judge.

9 - - -

10 (Proceedings concluded at 1:27 p.m.)

11  
12  
13 **C E R T I F I C A T E**

14  
15 I certify that the foregoing is a correct transcript  
16 from the record of proceedings in the above-entitled matter.

17  
18  
19 /s/ Donnalee Cotone 11th of July, 2024  
20 DONNALEE COTONE, RMR, CRR, CRC DATE  
21 Realtime Systems Administrator  
22  
23  
24  
25